

# EXHIBIT 3

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Attorneys for Defendant  
 HDI-GERLING AMERICA INSURANCE COMPANY

**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA**

FIREMAN'S FUND INSURANCE  
 COMPANY, a foreign corporation a/s/o  
 BASIC RESOURCES, INC. and GEORGE  
 REED, INC., a foreign corporation,

Plaintiff,

vs.

GERLING AMERICA INSURANCE  
 COMPANY, a foreign corporation,

Defendant.

CASE NO.: 3:07-cv-06302-CRB

**DEFENDANT GERLING AMERICA  
 INSURANCE COMPANY'S NOTICE OF  
 MOTION AND MOTION FOR LEAVE OF  
 COURT TO FILE SECOND AMENDED  
 COMPLAINT [F.R.C.P 15(a)(2)]**

Date: August 1, 2008  
 Time: 10:00 a.m.  
 Courtroom: 8

TO THE HONORABLE COURT AND TO PLAINTIFF AND ITS COUNSEL OF  
 RECORD:

PLEASE TAKE NOTE THAT, on August 1, 2008, at 10:00 a.m., or as soon thereafter as  
 the matter may be heard in Courtroom 8 before the Honorable Judge Charles R. Breyer at the  
 above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California 94012,  
 Defendant Gerling America Insurance Company will and hereby do move this Court as follows:

For an order granting Defendant Gerling leave to file its Second Amended Answer.

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Defendant Gerling's Motion for Leave of Court to File Second Amended Answer  
 3:07-cv-06302-CRB

1 This motion is based on the Notice of Motion, Memorandum of Points and Authorities filed  
2 herewith, the Declaration of Tino X. Do, the pleadings and papers filed herein, the pleadings and  
3 records in this case, and such other matters as the Court may deem appropriate.

4  
5 Dated: June 27, 2008

BARGER & WOLEN LLP

6  
7 By: /s/ Tino Do  
8 THOMAS R. BEER  
9 TINO X. DO  
Attorneys for Defendant GERLING  
AMERICA INSURANCE COMPANY

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **1. INTRODUCTION**

3 Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, Defendant Gerling  
4 America Insurance Company ("Gerling") moves this Court for leave to file its Second Amended  
5 Answer.

6 **2. ARGUMENT**

7 **A. Plaintiff Will Not Suffer Any Prejudice With the Filing of This Amended Answer**

8 Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend should be freely  
9 given "when justice so requires." Federal policy strongly favors determination of cases on their  
10 merits, and leave to amend pleadings is freely given unless the opposing party makes a showing of  
11 undue prejudice, or bad faith or dilatory motive on the part of the moving party. *Foman v. Davis*,  
12 371 U.S. 178, 182 (1962).

13 In this case, Gerling's only amendments to its Answer is the withdraw of the affirmative  
14 defenses of "Damage to Your Property Exclusion" and "Exhaustion of Policy Limits." Amendment  
15 is necessary because Gerling has determined that these affirmative defenses are not applicable to the  
16 claims at issue in this case. Given that this amendment only means that Plaintiff Fireman's Fund  
17 Insurance Company ("FFIC") has two less affirmative defenses to overcome, FFIC cannot claim  
18 prejudice, bad faith or dilatory motive with this amendment. Additionally, the issue of futility of  
19 amendment is not applicable in this situation where the amendment simply withdraws affirmative  
20 defenses.

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3. CONCLUSION

For the foregoing reasons, Gerling respectfully requests that the Court grant Gerling leave to file its Second Amended Answer.

Dated: June 27, 2008

BARGER & WOLEN LLP

By: /s/ Tino X. Do  
THOMAS R. BEER  
TINO X. DO  
Attorneys for Defendant GERLING  
AMERICA INSURANCE COMPANY

**Motions**

3:07-cv-06302-CRB Fireman's Fund Insurance Company et al v. Gerling America Insurance Company

ADRMOP, E-Filing, REFDISC

U.S. District Court  
Northern District of California  
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The following transaction was received from by Do, Tino entered on 6/27/2008 12:38 PM and filed on 6/27/2008

**Case Name:** Fireman's Fund Insurance Company et al v. Gerling America Insurance Company  
**Case Number:** 3:07-cv-6302  
**Filer:** Gerling America Insurance Company  
**Document Number:** 52

**Docket Text:**

**MOTION for Leave to File GERLING AMERICA INSURANCE COMPANY'S NOTICE OF MOTION AND MOTION FOR LEAVE OF COURT TO FILE SECOND AMENDED COMPLAINT [F.R.C.P. 15(a)(2)] filed by Gerling America Insurance Company. Motion Hearing set for 8/1/2008 10:00 AM in Courtroom 8, 19th Floor, San Francisco. (Do, Tino) (Filed on 6/27/2008)**

**3:07-cv-6302 Notice has been electronically mailed to:**

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CAND-ECF

Page 2 of 2

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**3:07-cv-6302 Notice has been delivered by other means to:**

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**J:\office2\29218\011\08 PDF\Gerling America Insurance Company's Notice of Motion and Motion for Leave of Court to File Seocnd Amended Complaint.pdf

**Electronic document Stamp:**

[STAMP CANDStamp\_ID=977336130 [Date=6/27/2008] [FileNumber=4494533-0]  
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9cd6077e44eb98633d5ad0c4ef32db81f4b0ee6fcf11ccfda31b9c6d3b1]]

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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

FIREMAN'S FUND INSURANCE  
 COMPANY, a foreign corporation a/s/o  
 BASIC RESOURCES, INC. and GEORGE  
 REED, INC., a foreign corporation,

Plaintiff,

vs.

GERLING AMERICA INSURANCE  
 COMPANY, a foreign corporation,

Defendant.

CASE NO.: 3:07-cv-06302-CRB

**DEFENDANT GERLING AMERICA  
 INSURANCE COMPANY'S SECOND  
 AMENDED ANSWER TO PLAINTIFF'S  
 FOURTH AMENDED COMPLAINT**

Defendant Gerling America Insurance Company ("Gerling") responds to Plaintiff's Fourth Amended Complaint at follows:

1. Answering paragraph 1 of the Fourth Amended Complaint, Gerling is informed and believes, and on such basis admits that Plaintiff Fireman's Fund Insurance Company ("FFIC") is a California insurance corporation, that FFIC is registered throughout the States, and that FFIC is authorized to conduct business in the State of California.

2. Answering paragraph 2 of the Fourth Amended Complaint, Gerling is informed and believes, and on such basis admits that FFIC insured Basic Resources and George Reed, California corporations. Except as admitted, Gerling lacks sufficient information or belief to admit or deny such allegations and, on that basis, denies all of them.

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**DEFENDANT SECOND AMENDED ANSWER TO PLAINTIFF'S FOURTH AMENDED COMPLAINT**  
**CASE NO.: 3:07-CV-06302-CRB**



1           3.       Answering paragraph 3 of the Fourth Amended Complaint, Gerling is informed and  
2 believes, and on such basis admits that FFIC made payment to Basic Resources and George Reed  
3 with respect to a claim for property damage due to an explosion of a 12,000 pound Stationary  
4 Asphalt Batch Plant ("Plant"). All other allegations in paragraph 3 are legal not factual and  
5 therefore no response is required, or are denied.

6           4.       Answering paragraph 4 of the Fourth Amended Complaint, Gerling admits that it is  
7 an insurance company existing under the laws of the State of New York, that it is registered with the  
8 California Department of Insurance, and that it insures Gencor Industries, Inc. ("Gencor") under a  
9 Commercial Lines Policy, policy number 4003-527-GLP ("Gerling Policy").

10          5.       Answering paragraph 5 of the Fourth Amended Complaint, Gerling admits that this  
11 Court has original diversity jurisdiction of this matter pursuant to 28 U.S.C. § 1332.

12          6.       Answering paragraph 6 of the Fourth Amended Complaint, Gerling admits that  
13 venue is proper in this Court.

14          7.       Answering paragraph 7 of the Fourth Amended Complaint, Gerling is informed and  
15 believes, and on such basis admits that in February 2000, Gencor entered into a written contract  
16 with Basic Resources and George Reed for the purchase of the Plant.

17          8.       Answering paragraph 8 of the Fourth Amended Complaint, Gerling is informed and  
18 believes, and on such basis admits that Gencor sold the Plant to Basic Resources and George Reed  
19 for \$1,989,679.00 and provided technical services including "start-up" for operation of the Plant.

20          9.       Answering paragraph 9 of the Fourth Amended Complaint, Gerling is informed and  
21 believes, and on such basis admits that the Plant exploded.

22          10.       Answering paragraph 10 of the Fourth Amended Complaint, Gerling lacks sufficient  
23 information or belief to admit or deny such allegations and, on that basis, denies all of them.

24          11.       Answering paragraph 11 of the Fourth Amended Complaint, Gerling admits that  
25 FFIC sued Gencor in a Florida state court.

26          12.       Answering paragraph 12 of the Fourth Amended Complaint, Gerling alleges that it  
27 defended Gencor in the state court action pursuant to an express reservation of rights, and that,  
28

1 following trial, a jury returned its verdict in favor of FFIC determining that Gencor breached its  
 2 contract with Basic Resources and George Reed and that Gencor was 60% negligent and Basic  
 3 Resources and George Reed were 40% negligent for the explosion.

4 13. Answering paragraph 13 of the Fourth Amended Complaint, Gerling alleges that a  
 5 *non in personam* Amended Final Judgment was entered in favor of FFIC in the amount of  
 6 \$1,751,913.10, and that this was judgment cannot be personally executed against Gencor.

7 14. Answering paragraph 14 of the Fourth Amended Complaint, Gerling alleges a *non in*  
 8 *personam* Final Judgment awarding costs in the amount of \$42,000 was entered in the state court  
 9 action, and that this judgment cannot be personally executed against Gencor.

10 15. Answering paragraph 15 of the Fourth Amended Complaint, Gerling admits that it  
 11 has denied FFIC's claims for coverage under the Gerling Policy. Except as admitted, Gerling  
 12 denies such allegations.

13 16. Answering paragraph 16 of the Fourth Amended Complaint, Gerling denies all such  
 14 allegations.

15 17. Answering paragraph 17 of the Fourth Amended Complaint, Gerling admits that the  
 16 law of the State of Florida applies to the interpretation of the terms of the Gerling Policy in this  
 17 action.

18 18. Answering paragraph 18 of the Fourth Amended Complaint, Gerling denies all such  
 19 allegations.

#### 20 **COUNT I – DECLARATORY RELIEF**

21 19. Answering paragraph 19 of the Fourth Amended Complaint, Gerling incorporates by  
 22 reference paragraphs 1-18 of this Answer.

23 20. Answering paragraph 20 of the Fourth Amended Complaint, Gerling denies all such  
 24 allegations. Gerling specifically denies that it has any duty to satisfy the Amended Final Judgment.

25 21. Answering paragraph 21 of the Fourth Amended Complaint, Gerling denies all such  
 26 allegations.

1           22.     Answering paragraph 22 of the Fourth Amended Complaint, Gerling denies all such  
2 allegations.

3           23.     Answering paragraph 23 of the Fourth Amended Complaint, Gerling denies all such  
4 allegations.

5                                   **COUNT II – BREACH OF CONTRACT**

6           24.     Answering paragraph 24 of the Fourth Amended Complaint, Gerling incorporates by  
7 reference paragraphs 1-23 of this Answer.

8           25.     Answering paragraph 25 of the Fourth Amended Complaint, Gerling denies all such  
9 allegations. Gerling specifically denies that it has any duty to satisfy the Amended Final Judgment.

10          26.     Answering paragraph 26 of the Fourth Amended Complaint, Gerling denies all such  
11 allegations.

12          27.     Answering paragraph 27 of the Fourth Amended Complaint, Gerling denies all such  
13 allegations.

14          28.     Answering paragraph 28 of the Fourth Amended Complaint, Gerling denies all such  
15 allegations.

16                                   **AFFIRMATIVE DEFENSES**

17                                   **FIRST AFFIRMATIVE DEFENSE**

18                                   **(Failure to State Claim)**

19          1.       The Fourth Amended Complaint and all claims for relief therein fail to state facts  
20 sufficient to state a claim against Gerling.

21                                   **SECOND AFFIRMATIVE DEFENSE**

22                                   **(Lack of Standing)**

23          2.       FFIC lacks standing to assert a claim for coverage under the Gerling Policy.

24                                   **THIRD AFFIRMATIVE DEFENSE**

25                                   **(No Coverage)**

26          3.       The Gerling Policy does not provide coverage for the loss and damages claimed by  
27 FFIC.

**FOURTH AFFIRMATIVE DEFENSE**

**(No Coverage for Underlying State Court Action)**

4. The Gerling Policy does not provide coverage for the alleged losses claimed in the underlying state court action by reason of the policy's terms, conditions, defenses and exclusions.

**FIFTH AFFIRMATIVE DEFENSE**

**(Condition Precedent to Coverage)**

5. FFIC fails to meet one or more of the conditions precedent to coverage under the Gerling Policy with respect to the claims alleged in the Fourth Amended Complaint.

**SIXTH AFFIRMATIVE DEFENSE**

**(Non In Personam Judgment)**

6. The Amended Final Judgment that underlies FFIC's claim for coverage under the Gerling Policy is not "*in personam*" against Gencor and therefore does not provide any right to coverage under the Gerling Policy as Gencor is not "legally obligated to pay" the judgment.

**SEVENTH AFFIRMATIVE DEFENSE**

**(Final Amended Judgment)**

7. The Amended Final Judgment does not give rights to coverage under the Gerling Policy as a judgment for damages has not been entered against Gencor.

**EIGHTH AFFIRMATIVE DEFENSE**

**(Contractual Liability Exclusion)**

8. FFIC's claims are barred, in whole or in part, pursuant to the contractual liability exclusion of the Gerling Policy in that the underlying verdict obtained by FFIC as against Gencor is predicated upon a contractual liability allegedly deriving out of Gencor's contract with Basic Resources and George Reed.

**NINTH AFFIRMATIVE DEFENSE**

**(Damage to Your Product Exclusion)**

9. FFIC's claims are barred, in whole or in part, pursuant to the "Damage to Your Product" exclusion of the Gerling Policy.

**TENTH AFFIRMATIVE DEFENSE**

**(Engineers, Architects or Surveyors Professional Liability Exclusion)**

10. FFIC's claims are barred, in whole or in part, pursuant to the "Engineers, Architects or Surveyors Professional Liability" exclusion of the Gerling Policy as Gencor was allegedly obligated under the written contract with Basic Resources and George Reed to provide adequate field engineering service and the damages claimed allegedly arose out of those services rendered by Gencor employees, thereby excluding coverage.

**ELEVENTH AFFIRMATIVE DEFENSE**

**(Damage to Your Work Exclusion)**

11. FFIC's claims are barred, in whole or in part, pursuant to the "Damage to Your Work" exclusion of the Gerling Policy as the installation of the Plant was allegedly completed and damages were from the product itself or from the work performed on the product.

**TWELFTH AFFIRMATIVE DEFENSE**

**(Breach of Contract)**

13. FFIC's claims are barred because the Gerling Policy does not provide coverage for a breach of contract by the insured.

**THIRTEENTH AFFIRMATIVE DEFENSE**

**(Other Insurance Provision)**

14. FFIC's claims are barred, in whole or in part, pursuant to the "Other Insurance" provision of the Gerling Policy.

**FOURTEENTH AFFIRMATIVE DEFENSE**

**(Right to Raise Additional Defenses)**

15. Gerling reserves its right to raise additional affirmative defenses and to supplement those asserted herein upon discovery of further information and upon further investigation.

WHEREFORE, Gerling prays for judgment as follows:

1. That FFIC take nothing by reason of the Fourth Amended Complaint;
2. That the Court enter judgment in favor of Gerling, in all respects; and

1           3.       That the Court grant Gerling such other and further relief as the Court may deem just  
2 and proper.

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4  
5 Dated: June 27, 2008

BARGER & WOLEN LLP

6  
7 By: /s/ Tino X. Do  
8 THOMAS R. BEER  
9 TINO X. DO  
Attorneys for Defendant GERLING  
AMERICA INSURANCE COMPANY  
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DEFENDANT'S SECOND AMENDED ANSWER TO PLAINTIFF'S FOURTH AMENDED COMPLAINT  
CASE NO.: 3:07-CV-06302-CRB

## Other Answers

3:07-cv-06302-CRB Fireman's Fund Insurance Company et al v. Gerling America Insurance Company

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**Case Name:** Fireman's Fund Insurance Company et al v. Gerling America Insurance Company  
**Case Number:** 3:07-cv-6302  
**Filer:** Gerling America Insurance Company  
**Document Number:** 54

**Docket Text:**

**AMENDED ANSWER to GERLING AMERICA INSURANCE COMPANY'S SECOND AMENDED ANSWER TO PLAINTIFF'S FOURTH AMENDED COMPLAINT [29] Amended Complaint, by Gerling America Insurance Company. (Do, Tino) (Filed on 6/27/2008)**

**3:07-cv-6302 Notice has been electronically mailed to:**

Thomas R. Beer tbeer@barwol.com, jlee@barwol.com, mbatres@barwol.com, tdo@barwol.com, ynesbitt@barwol.com

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